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McGEORGE SCHOOL OF LAW
UNIVERSITY OF THE PACIFIC
Sacramento, California

TO: ANTHONY LEWIS :

DATE: 9/13/93

HERE'S THE NEW VERSION,
ALONG WITH THE LATEST BRIEFS
FROM GRISWOLD + THE POST. THE
AFFIDAVIT IS NSA'S EXPLANATION
OF WHY THE LAST TWO PARAGRAPHS
OF GRISWOLD (p.9) CAN'T BE RELEASED.
THANKS FOR YOUR HELP. *John*

#32-0006 11/87

JOHN CARY SIMS,
Plaintiff,
v.
DEPARTMENT OF JUSTICE,
Defendant.

CIVIL ACTION
NO. 92-2218 (TPJ)

MICHAEL A. SMITH hereby declares and says:

1. I am the Director of Policy of the National Security Agency (NSA). In this capacity, I am a TOP SECRET classification authority and am responsible for processing requests made pursuant to the Freedom of Information Act (FOIA) for NSA records and review of other documents containing information relating to activities for which NSA is responsible. The statements herein are based upon my personal knowledge, my personal review of the information available to me in my official capacity, upon advice of NSA counsel, and upon conclusions reached in accordance therewith.

2. The plaintiff has requested certain documents pertaining to the "Pentagon Papers" litigation of 1971. The Department of Justice, after searching for responsive documents in its files, referred certain documents, to the Office of the Secretary of Defense (OSD). Seven of those documents were in turn referred to the National Security Agency for review. The documents referred to NSA, and discussed here, are identified by their OSD Case and Document number. All of the information in these documents relates to NSA Signals Intelligence (SIGINT) activity in Vietnam during the Vietnam War prior to 1971. The

information has been reviewed in accordance with the recent Executive Order 12812 which requires the declassification of Prisoner of War/Missing in Action (POW/MIA) materials consistent with the criteria provided by Executive Order 12356. Despite its age, I have determined that release of certain portions of these documents would reveal specific information regarding communications intelligence and cryptologic activities, thereby jeopardizing intelligence sources and methods. Therefore, six of the referred documents contain information which has been withheld from Professor Sims, pursuant to the FOIA exemptions at 5 U.S.C. § 552 (b)(1) and (b)(3).

3. The National Security Agency was established by Presidential Directive in October 1952 as a separately organized Agency within the Department of Defense. It operates under the direction, authority and control of the Secretary of Defense, who is designated by the President as Executive Agent of the Government for conducting the communications security, now expanded to information systems security activities, and signals intelligence activities of the United States. NSA's signals intelligence (SIGINT) mission is to intercept foreign communications to obtain foreign intelligence information necessary to the national defense, national security, and the conduct of the foreign affairs of the United States Government. Six of the seven documents requested by plaintiff and referred to NSA contain information which is either a summary of the information derived from signals intelligence activities, or an analysis of the impact release of that information would have on national security.

4. A fundamental tenet of the communications intelligence process is that the identity of the targets, the degree of success in exploiting those targets, the vulnerability of particular foreign communications, the ability to process large masses of information, and the extent of any analytic successes are all matters that must be maintained in strictest secrecy. Disclosures of any of these items of information could encourage countermeasures to prevent interception of communications, with the likely result that the United States would be denied valuable intelligence. If a foreign government is successful in defeating an intercept oper-

ation, all of the intelligence from that source is lost. The risk is great. The information produced by NSA is of great value to the President, the Secretary of Defense, the Secretary of State and other senior policymakers. If a source used by the Agency becomes unavailable, policymakers must operate without the information that source produced. Sometimes it is impossible to establish a new and equivalent intercept and the source is lost permanently. These losses can be extremely harmful to the national security.

5. Even though the information involved in this case is over twenty years old, revealing that information, which relates to intelligence capabilities, sources and methods, and the foreign relations and activities of the United States, still can be expected to cause harm to the national security. Many countries are not technologically advanced beyond the capabilities that existed during the Vietnam War. Thus, information that would reveal, either directly or indirectly, the exploitation of specific foreign government's communications is classified, in accordance with the provisions of Executive Order 12356, Section 1.3 (a)(2), (a)(4), and (a)(8) in order to protect intelligence capabilities which may be applied currently or in the future. Information which can reveal such specific exploitation includes the content of communications and information that would reveal the source of the communication. Similarly, information about U.S. foreign relations is classified in accordance with Section 1.3(a)(5) of Executive Order 12356 to protect those activities. Section 1.3 (a)(2) provides that information shall be considered for classification if it concerns vulnerabilities or capabilities of systems relating to the national security. Section 1.3 (a)(4) provides that information shall be considered for classification if it concerns intelligence activities or intelligence sources or methods. Section 1.3 (a)(5) provides that information shall be considered for classification if it concerns foreign relations or foreign activities of the United States. Section 1.3(a) (8) provides that information shall be considered for classification if it concerns cryptology.

6. The withheld information is also protected from disclosure by exemption 3 of FOIA, 5 U.S.C. § 552(b)(3), which provides that information specifically exempted from

disclosure by other statutes, may be withheld under FOIA. The applicable statutory provisions with regard to this information are: 18 U.S.C. § 798, which prohibits the release of classified information concerning communications intelligence activities to unauthorized persons; 50 U.S.C. § 403(d)(3), which protects information pertaining to intelligence sources and methods, and Section 6 of the National Security Agency Act of 1959 (Public Law 86-36, 50 U.S.C. § 402 note), which provides that no law shall be construed to require the disclosure of the organization, personnel, functions, or activities of the National Security Agency.

7. In OSD Case 91-FOI-1319, document #1, The Brief for the United States (Secret Portion) (Sims request #1), two paragraphs on p. 9 have been redacted because despite its age, the information contained therein would still reveal the vulnerabilities or capabilities of systems relating to the national security, intelligence sources and methods, and information on cryptology. Thus, I have determined that the information in the first redacted paragraph is currently and properly classified SECRET and the information in the second redacted paragraph is currently and properly classified as TOP SECRET in accordance with sections 1.3(a)(2), (a)(4), and (a)(8) of Executive Order 12356. Disclosure of this information reasonably could be expected to cause serious damage and exceptionally grave damage to the national security, respectively. The information is therefore exempt from disclosure under exemption 1 of FOIA, 5 U.S.C. § 552(b)(1). In addition, this information is therefore exempt from disclosure under exemption 3 of FOIA in accordance with 50 U.S.C. § 403(d)(3) because disclosure would reveal intelligence sources and methods and 18 U.S.C. § 798 because disclosure would cause the release of classified information concerning communications intelligence activities to unauthorized individuals. The same information is also integrally related to the SIGINT activities of NSA and as such is protected from disclosure under Exemption 3 of FOIA in accordance with section 6 of Public Law 86-36, (50 U.S.C. 402 note).

8. In OSD Case 91-FOI-1131, we were referred five documents: #2, #3, #5, #9 and

#10. Document #2 of OSD 91-FOI-1131 is the Washington Post's "In Camera Analysis of the Evidence," and document #3 is entitled "Analysis of the In Camera Evidence." These are identical documents, except that #2 has a cover page with the title "In Camera Analysis of the Evidence" while #3 does not. Identical redactions have been made in both documents. On p. 8 of both documents a subparagraph which quotes from the affidavit of Admiral Gaylor is redacted because taken in its context, it reveals information about the vulnerabilities and capabilities of intelligence systems, and cryptology, as well as methods of intelligence collection and dissemination. I have determined that this information is currently and properly classified SECRET in accordance with sections 1.3(a)(2), (a)(4), and (a)(8) of Executive Order 12356 and that disclosure of this information reasonably could be expected to cause serious damage to the national security. The information is therefore exempt from disclosure under exemption 1 of FOIA, 5 U.S.C. § 552(b)(1). In addition, this information is therefore exempt from disclosure under exemption 3 of FOIA in accordance with 50 U.S.C. § 403(d)(3) because disclosure would reveal intelligence sources and methods and 18 U.S.C. § 798 because disclosure would cause the release of classified information concerning communications intelligence activities to unauthorized individuals. The same information is also integrally related to the SIGINT activities of NSA and as such is protected from disclosure under Exemption 3 in accordance with section 6 of Public Law 86-36, (50 U.S.C. 402, note).

9. On p. 10 of documents #2 and #3, we have withheld a paragraph relating to foreign relations, cryptology, and intelligence sources and methods. I have determined that this information is currently and properly classified SECRET in accordance with sections 1.3(a)(2), (a)(4), (a)(5), and (a)(8) of Executive Order 12356 and that disclosure of this information reasonably could be expected to cause serious damage to the national security. The information is therefore exempt from disclosure under exemption 1 of FOIA, 5 U.S.C. § 552(b)(1). In addition, this information is therefore exempt from disclosure under exemption 3 of FOIA in accordance with 50 U.S.C. § 403(d)(3) because disclosure would reveal

intelligence sources and methods and 18 U.S.C. § 798 because disclosure would cause the release of classified information concerning communications intelligence activities to unauthorized individuals. The same information is also integrally related to the SIGINT activities of NSA and as such is protected from disclosure under Exemption 3 in accordance with section 6 of Public Law 86-36, (50 U.S.C. 402 note). Additionally on p. 10 we have withheld personnel and budget amounts under the exemption 3 of FOIA, 5 U.S.C. § 552 (b)(3), as this information is protected from disclosure by Public Law 86-36, the National Security Act of 1959, 50 U.S.C. § 402 note.

10. Doc #5 of OSD Case 1131 is the handwritten notes taken by one of the parties, apparently during the hearing. On p. 4 and p. 5 of those notes, we have made redactions where the notemaker made notes on the paragraphs in the Secret Brief of the U.S., which quoted Admiral Gaylor's affidavit. We redacted those paragraphs in the brief, as properly and currently classified, and as protected from disclosure by other statutes, as explained in paragraph 7 above, and we redact the handwritten notes on that portion of the brief as well, for the same reasons.

11. Doc #9 is a 32 page document entitled "Comments on the Specified Items Submitted by the United States." The author or origin of it is unknown. It appears to be either item #2 on Sims' FOIA request, the statement prepared by the Department of Defense, or the Department of State, giving more detail about some of the items which are discussed in the Secret portion of the Brief. Or, it may be responsive to Sims request #12, a "report, study, letter or other record discussing, identifying, evaluating or quantifying any harm or alleged harm to the national security or foreign relations of the United States resulting from publication of the Pentagon Papers." On page 2 of Doc #9 in the "Argument" we have redacted two sentences which contain information on cryptology, intelligence sources and methods, and the vulnerabilities and capabilities of intelligence systems. I have determined that this information is currently and properly classified SECRET in accordance with sections 1.3(a)(2), (a)(4), and (a)(8) of Executive Order 12356 and that

disclosure of this information reasonably could be expected to cause serious damage to the national security. The information is therefore exempt from disclosure under exemption 1 of FOIA, 5 U.S.C. § 552(b)(1). In addition, this information is therefore exempt from disclosure under exemption 3 of FOIA in accordance with 50 U.S.C. § 403(d)(3) because disclosure would reveal intelligence sources and methods and 18 U.S.C. § 798 because disclosure would cause the release of classified information concerning communications intelligence activities to unauthorized individuals. The same information is also integrally related to the SIGINT activities of NSA and as such is protected from disclosure under Exemption 3 in accordance with section 6 of Public Law 86-36, (50 U.S.C. 402 note). On page 5, we have redacted the item at the bottom of the page, and the argument on that item which continues on page 6, because that item and argument reveal information concerning vulnerabilities or capabilities of systems relating to the national security, cryptology, foreign government activities, and intelligence sources and methods. I have determined that this information is currently and properly classified TOP SECRET in accordance with sections 1.3(a)(2), (a)(4), (a)(5), and (a)(8) of Executive Order 12356 and that disclosure of this information reasonably could be expected to cause exceptionally grave damage to the national security. The information is therefore exempt from disclosure under exemption 1 of FOIA, 5 U.S.C. § 552(b)(1). In addition, this information is therefore exempt from disclosure under exemption 3 of FOIA in accordance with 50 U.S.C. § 403(d)(3) because disclosure would reveal intelligence sources and methods and 18 U.S.C. § 798 because disclosure would cause the unlawful release of classified information concerning communications intelligence activities to unauthorized individuals. The same information is also integrally related to the SIGINT activities of NSA and as such is protected from disclosure under Exemption 3 in accordance with section 6 of Public Law 86-36, (50 U.S.C. 402 note).

12. On page 15, we have redacted the item at the bottom of the page and the subsequent argument following on the next page since this item and argument discuss intelligence sources and methods, cryptology and the foreign relations of the United States. I

have determined that this information is currently and properly classified TOP SECRET in accordance with sections 1.3(a)(2), (a)(4), (a)(5), and (a)(8) of Executive Order 12356 and that disclosure of this information reasonably could be expected to cause exceptionally grave damage to the national security. The information is therefore exempt from disclosure under exemption 1 of FOIA, 5 U.S.C. § 552(b)(1). In addition, this information is therefore exempt from disclosure under exemption 3 of FOIA in accordance with 50 U.S.C. § 403(d)(3) because disclosure would reveal intelligence sources and methods and 18 U.S.C. § 798 because disclosure would cause the unlawful release of classified information concerning communications intelligence activities to unauthorized individuals. The same information is also integrally related to the SIGINT activities of NSA and as such is protected from disclosure under Exemption 3 in accordance with section 6 of Public Law 86-36, (50 U.S.C. 402 note).

13. Doc #10 of 1131 is similar to Doc #9 and is relevant to Sims request #2 or #12. Doc #10 is a 32 page document, with the first page entitled "Identified as a JCS document." Beginning on the 3rd page of that document, there is a security marking of "Top Secret" with handling caveat following. The handling caveat has been deleted at the top and bottom of each page of this document, as information that relates to the functions and activities of the National Security Agency. Such information is protected from disclosure by Public Law 86-36, (50 U.S.C. § 402 note) and thus is withheld under exemption 3 of FOIA, 5 U.S.C. § 552(b)(3). Pages 3 and 4 of Doc #10 are damage assessments which relate to the vulnerabilities or capabilities of systems, intelligence sources and methods, and cryptology. They reveal U.S. rationale as to what information is sensitive, and if these damage assessments were released, they could provide valuable insight to our adversaries and lead to a loss of collection. I have determined that this information is currently and properly classified SECRET in accordance with sections 1.3(a)(2), (a)(4), and (a)(8) of Executive Order 12356 and that disclosure of this information reasonably could be expected to cause serious damage to the national security. The information is therefore exempt from

disclosure under exemption 1 of FOIA, 5 U.S.C. § 552(b)(1). In addition, this information is therefore exempt from disclosure under exemption 3 of FOIA in accordance with 50 U.S.C. § 403(d)(3) because disclosure would reveal intelligence sources and methods and 18 U.S.C. § 798 because disclosure would cause the release of classified information concerning communications intelligence activities to unauthorized individuals. The same information is also integrally related to the SIGINT activities of NSA and as such is protected from disclosure under Exemption 3 in accordance with section 6 of Public Law 86-36, (50 U.S.C. 402 note).

14. Beginning on the 5th page of Doc #10, the pages are not numbered, but each page is entitled "Item #" and those Items are numbered 1 through 27, inclusive. We have redacted the same single sentence in Items 1 and 4, because it pertains to intelligence sources and methods, the foreign relations of the United States and to cryptology. I have determined that this information is currently and properly classified SECRET in accordance with sections 1.3(a)(2), (a)(4), (a)(5), and (a)(8) of Executive Order 12356 and that disclosure of this information reasonably could be expected to cause serious damage to the national security. The information is therefore exempt from disclosure under exemption 1 of FOIA, 5 U.S.C. § 552(b)(1). In addition, this information is therefore exempt from disclosure under exemption 3 of FOIA in accordance with 50 U.S.C. § 403(d)(3) because disclosure would reveal intelligence sources and methods and 18 U.S.C. § 798 because disclosure would cause the release of classified information concerning communications intelligence activities to unauthorized individuals. The same information is also integrally related to the SIGINT activities of NSA and as such is protected from disclosure under Exemption 3 in accordance with section 6 of Public Law 86-36, (50 U.S.C. 402 note). We have redacted personnel numbers in Items 2, 3, 5, and 6, as well as budget information in Item 2. These redactions were made pursuant to exemption 3 of FOIA, 5 U.S.C. § 552(b)(3) as information pertaining to the organization, personnel, functions and activities of the National Security Agency and thus, protected from disclosure by Public Law 86-36, 50

U.S.C. § 402 note.

15. Finally, in Doc #10, we have redacted the quoted sensitive text in Item 10 because it reveals information on the vulnerabilities and capabilities of intelligence systems, intelligence sources and methods, and cryptology. I have determined that this information is currently and properly classified SECRET in accordance with sections 1.3(a)(2), (a)(4), and (a)(8) of Executive Order 12356 and that disclosure of this information reasonably could be expected to cause serious damage to the national security. The information is therefore exempt from disclosure under exemption 1 of FOIA, 5 U.S.C. § 552(b)(1). In addition, this information is therefore exempt from disclosure under exemption 3 of FOIA in accordance with 50 U.S.C. § 403(d)(3) because disclosure would reveal intelligence sources and methods and 18 U.S.C. § 798 because disclosure would cause the release of classified information concerning communications intelligence activities to unauthorized individuals. The same information is also integrally related to the SIGINT activities of NSA and as such is protected from disclosure under Exemption 3 in accordance with section 6 of Public Law 86-36, (50 U.S.C. 402 note).

16. It is not possible to further describe the withheld information in an unclassified declaration because any additional identification would divulge properly classified information. If this Court decides that further explanation is necessary, I am prepared to describe more specifically the withheld information and the damage to national security that would reasonably flow from its disclosure in a classified declaration for the Court's in camera, ex parte consideration.

17. I hereby declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge.


MICHAEL A. SMITH

Executed on this 12th day of March, 1993.